

The issue for review is whether respondent had timely notice of claimant's accident and, if not, whether just cause exists for extending the 10-day notice period to 75 days.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Claimant is an over-the-road truck driver for the respondent. His duties also included unloading and loading freight. Claimant testified he had been suffering some stomach problems with nausea and pain around his rib cage and in August 2004 he had sought medical treatment at the emergency room in Vernon, Illinois. The emergency room doctor suspected gall bladder problems and advised the claimant to see his personal physician. On December 13, 2004, claimant saw Dr. Vinaychandra Patel in El Paso, Texas, due to his ongoing epigastric discomfort and pain radiating around to the back.

Claimant was unloading a load of water heaters in Lenexa, Kansas, on December 21, 2004, when he experienced pain in his stomach and into his back. He testified the symptoms were in the same location as before but were much worse. The claimant described the pain in the following manner:

Q. During that period of time [unloading the water heaters] did you begin to experience some physical symptoms?

A. Yes, I started getting that same pain and the stomach problems, getting sick to my stomach, and the pain went around to my back. And it was worse that day than it ever had been, and I thought that I was still having stomach problems like I was before but they were just getting worse. At that time I thought I was having more problems with my stomach, and it was getting worse and worse.

Q. Okay. You indicated that during this period of time you were lifting the water coolers it became worse at that time, your symptoms were more pronounced than they had been in the past?

A. Yeah, they hurt worse than ever clear back to August.¹

On cross examination, the claimant testified to the following:

Q. (By Mr. Conklin) And at the time that you actually sustained the injury you felt a tearing sensation in your side; isn't that correct?

A. Yeah, in my -- I was sick to my stomach, had the tearing and felt like a knife -- I thought it was from the stomach problems that I had already been having right then and there, but I didn't know.

¹ P.H. Trans. at 13.

Q. But my point is that when you first experienced that pain it wasn't just a general pain, you described it as, "I felt like I tore something"?

A. Right. It felt worse than any of the other times prior to that.

Q. In fact, you had to sit down at that time; isn't that correct?

A. I sat down for a few minutes.

Q. And you asked for individuals to help you unload at that time?

A. I asked for a little more help, yes.²

Q. (By Mr. Smith) And just a final question. Initially on December 21st of 2004 when you were doing these lifting activities, when you started having those increased symptoms, at that point did you know whether you had injured yourself or whether this was just an increase of your stomach condition?

A. At that time I didn't know for sure, no.³

Claimant returned home and sought additional treatment with Dr. Patel. Claimant testified the doctor had "pictures" taken of his stomach and after they failed to reveal anything the doctor then performed a colonoscopy on the claimant to determine why he was having the increased symptoms. After the colonoscopy failed to reveal anything, Dr. Patel referred the claimant to an orthopedic surgeon, Dr. Barry L. Cromer.

Dr. Cromer examined claimant on January 10, 2005, and was given a history of back pain which increased after unloading water heaters. Dr. Cromer diagnosed a probable herniated disk and provided conservative treatment which later included epidural steroid injections. An MRI of the lumbar spine on January 27, 2005, revealed mild degenerative disk disease at L2-3, L3-4, and L4-5 with mild inferior neural foraminal narrowing bilaterally at L4-5 associated with bulging disk material.

In summary, claimant was initially being treated for stomach problems that radiated into his back. After his symptoms markedly worsened while he was unloading water heaters he returned to his physician who performed diagnostic tests that failed to reveal claimant was suffering from gastrointestinal problems. The claimant was then referred to an orthopedist and ultimately diagnosed with a bulging disk causing radicular pain into the leg.

² *Id.* at 30-31.

³ *Id.* at 41.

After claimant was diagnosed with back problems he testified he then notified the person who handles insurance for respondent, Donna, and told her that he had hurt his back at work. He could not recall the date of the incident but that it had been while unloading water heaters and Ms. Hamlin checked the records and noted that had occurred on December 21, 2004, in Lenexa, Kansas. Claimant testified his conversation with Donna occurred sometime between January 3rd and January 10th. Approximately January 21, 2005, claimant received the insurance paperwork from respondent to apply for short-term disability which indicated the injury was not work related.

Upon receipt of the paperwork regarding short-term disability the claimant then called Frederick F. Thayer, vice-president of safety and operations for respondent, and told him that he had hurt his back at work. However, Mr. Thayer testified that although he had spoken with claimant regarding how he was doing, the first time claimant alleged a work-related back injury was on March 4, 2005, when Donna Tomlinson told him claimant had just told her that he had injured his back at work on December 21, 2004. Ms. Tomlinson, in a written report, indicated that claimant had been out on sick leave since December 24, 2004, and although she had spoken with claimant on numerous occasions he never mentioned a work-related incident until March 4, 2005.

K.S.A. 44-520 provides:

Notice of injury. Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

Initially, it must be determined whether claimant provided respondent with timely notice of a work-related injury during the conversations he had with Ms. Tomlinson or Mr. Thayer. Claimant could not provide a specific date when he allegedly first notified Ms. Tomlinson that he had injured his back at work. Although the span of possible dates when the conversation allegedly occurred would include dates within ten days of the accident, nonetheless, Ms. Tomlinson and Mr. Thayer both indicated that claimant never alleged a work-related injury until March 4, 2005. The ALJ concluded the conversations did not

provide either Ms. Tomlinson or Mr. Thayer with sufficient information to place the respondent on notice that claimant was alleging an accident. The Board agrees.

The dispositive issue is whether claimant had just cause to fail to provide notice until March 4, 2005, which would be within 75 days of the alleged accident date of December 21, 2004. Claimant admitted he was aware of the requirement to notify the respondent of any workplace accident.

K.S.A. 44-520 provides that in the event an employee fails to provide notice within 10 days, the notice time can be extended to 75 days if just cause exists for the claimant's failure to provide notice within 10 days.

In this instance, claimant was initially suffering from significant abdominal pain which included back pain and he had sought treatment for that condition. Initial treatment focused on possible gastrointestinal problems. While unloading the water heaters the claimant experienced symptoms in the same location but they worsened. The fact that claimant might delay in noticing that he suffered a back injury would be understandable. Claimant then returned to his physician and additional diagnostic testing was performed which eliminated the possibility of gastrointestinal problems. Claimant was then referred for an orthopedic examination. Additionally, the medical records indicate the existence of a bulging disk at the L4-5 level was not revealed until the MRI was performed. Claimant was not advised of this problem until sometime in January 2005. The Board, therefore, finds that there was just cause for claimant's failure to provide notice to respondent within ten days of the December 21, 2004 accident. Therefore, pursuant to K.S.A. 44-520, the notice provided by claimant within 75 days of the accident would be timely.

As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing of the claim.⁴

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Robert H. Foerschler dated July 21, 2005, is reversed and the matter remanded to the Administrative Law Judge for the determination of the remaining issues.

IT IS SO ORDERED.

Dated this _____ day of September 2005.

BOARD MEMBER

⁴ K.S.A. 44-534a(a)(2).

c: Patrick C. Smith, Attorney for Claimant
Darin M. Conklin, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director